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Nos. 88-429 and 88-494

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

WASHINGTON LEGAL FOUNDATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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MEMORANDUM OF APPELLEE AMERICAN BAR ASSOCIATION IN RESPONSE TO JURISDICTIONAL STATEMENTS

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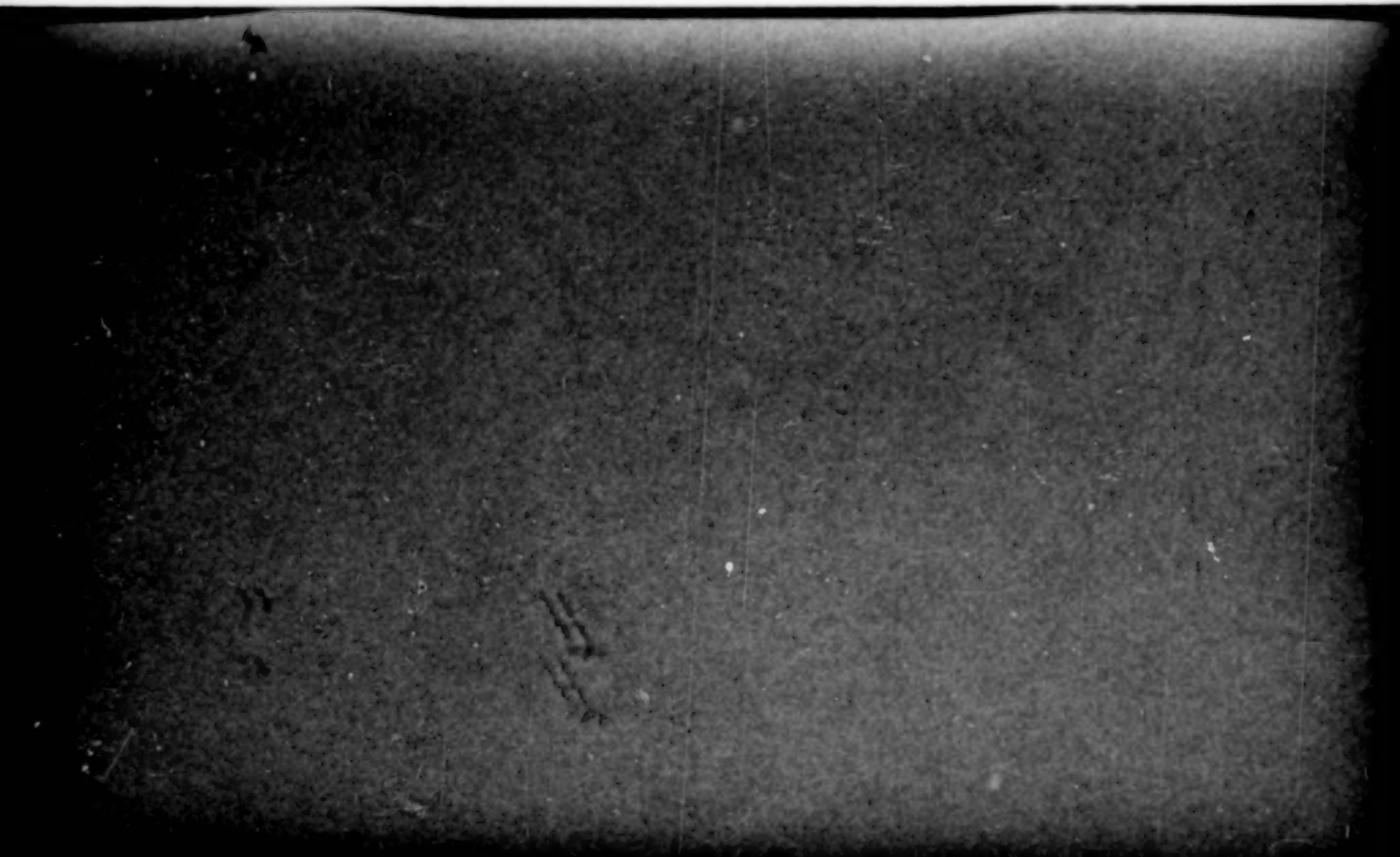

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MEMORANDUM OF APPELLEE AMERICAN BAR ASSOCIATION IN RESPONSE TO JURISDICTIONAL STATEMENTS

The American Bar Association ("ABA") hereby responds to the jurisdictional statements filed by Public Citizen and Washington Legal Foundation ("WLF")

seeking plenary review of an order of the United States District Court for the District of Columbia in *Washington Legal Foundation* v. *United States Department of Justice*, 691 F. Supp. 483 (1988).[1] For reasons stated below, the district court's order ought to be affirmed. However, in view of this Court's general practice of noting probable jurisdiction in, and deciding on the merits, cases in which a single district judge has declared an Act of Congress unconstitutional,[2] the ABA does not oppose appellants' requests for plenary review of the district court's order.

STATEMENT OF THE CASE

A. The Judicial Appointment Process And The American Bar Association

Article II, Section 2, of the Constitution empowers the President to appoint members of the federal judiciary with the advice and consent of the Senate. In exercising this power of appointment, the President historically has consulted many sources, including Justice Department officials, Senators, Congressmen and political advisors, who, in turn, may rely on the views and opinions of lawyers, law school deans, state and local bar associations, political groups, and many other sources. App. 4a. During the confirmation process, the Senate and, in particular, the Senate Judiciary Committee, consider a similarly wide range of views. In this case, appellants invoke the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), in an attempt to regulate the efforts of one organization, the ABA, to gather information and express its views during this process and to regulate the ability of the Executive to seek the views of that organization.

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[1] The opinion and order of the district court are reproduced in the Appendix to the jurisdictional statement in No. 88-429 (App. 1a-28a).

[2] *See Bowen* v. *Kendrick*, 108 S. Ct. 1 (1987).

The ABA is a private voluntary professional association of approximately 328,000 attorneys throughout the United States. App. 4a-5a. One of the ABA's principal goals is to promote the administration of justice throughout the Nation. To foster this goal, the ABA has created a large number of committees that operate under the direction of the ABA Board of Governors, including the ABA Standing Committee on Federal Judiciary (the "ABA Committee"). Neither the ABA nor the ABA Committee is affiliated with or controlled by any federal or state governmental entity.

The ABA Committee evaluates, on behalf of the ABA, the professional qualifications of prospective nominees to the federal judiciary. So as not to compromise this evaluative function, the ABA Committee never recommends or proposes candidates for the federal judiciary.[3] Rather, the ABA Committee evaluates the professional qualifications of those persons identified by the President, through the United States Department of Justice, as possible nominees to the federal bench. App. 5a; *Washington Legal Foundation* v. *American Bar Association Standing Committee on Federal Judiciary*, 648 F. Supp. 1353, 1355 (D.D.C. 1986) (*"WLF I"*). The Committee has provided its evaluation to the President with respect to almost every federal judicial appointment since 1952 and to the Senate Judiciary Committee with respect to every federal judicial nominee since 1948. *ABA Standing Committee* at 1.

The ABA Committee's fact gathering is generally performed initially by the ABA Committee member for the Circuit in which the judicial vacancy exists. App. 5a-6a; *ABA Standing Committee* at 5-6. The Circuit member examines the available legal writings of the prospective

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[3] ABA, *Standing Committee on Federal Judiciary: What It Is and How It Works* 1 (1983) (*"ABA Standing Committee"*) (attached as Exhibit A to WLF's Conditional Response to Defendant's Statement of Material Facts filed April 30, 1987).

nominee and conducts a large number of confidential interviews with judges, law professors, and a representative number of lawyers in the nominee's community, seeking information concerning the prospective nominee's competence, integrity and temperament. *Id.* at 5. This information-gathering process includes a meeting between the Circuit member and the prospective nominee, which affords the prospective nominee an opportunity to discuss his or her qualifications for a judgeship and to respond to any adverse information gathered during the interview process. App. 6a; *ABA Standing Committee* at 6.

Confidentiality is absolutely essential to the Committee's work. If persons interviewed knew that their views might be disclosed, they would not be willing to speak candidly about persons in whose courts they might later appear. Accordingly, every attempt is made during the interview process to protect the confidentiality of information provided by both prospective nominees and persons interviewed. App. 6a. Details concerning individual interviews, including the identity of those interviewed, are not disclosed to the Department of Justice or to the public. *Id.*

At the conclusion of the initial information-gathering process, the Circuit member prepares a confidential written report to the chairman. This report contains a description of the prospective nominee's background, summaries of all interviews conducted (including the interview with the prospective nominee), an evaluation of the prospective nominee's qualifications and one of four recommended ratings ("Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified"). App. 6a. When a rating of "Not Qualified" is a significant possibility, that fact is communicated orally to the Department of Justice before the process goes beyond the information-gathering stage. ABA Answer to WLF Complaint ¶¶ 11-12. Under such circumstances, the prospective nom-

inee's name on occasion has been withdrawn from consideration for a particular vacancy and the Committee has not conducted any further investigation or evaluation.

Absent the Department's withdrawal of the nominee's name, or if the initial report indicates that the rating of the prospective nominee is likely to be "Qualified" or better, the Circuit member then sends to all members of the ABA Committee a confidential written formal report, the response to a personal data questionnaire and any other materials thought relevant by the Circuit member. *ABA Standing Committee* at 6. After studying the formal report and its enclosures, each member transmits by mail or telephone a vote to the chairman. *Id.* at 6-7. If questions are raised, the ABA Committee may discuss the prospective nominee by telephone conference call or at a meeting. *Id.* at 7. The chairman then confidentially informs the Attorney General's office in a one or two sentence written report of the ABA Committee's rating. App. 6a. If the ABA Committee has been unanimous in its rating, the report so states. *Id.* Otherwise, the report reflects the rating given by a majority or substantial majority of the ABA Committee. *Id.* The ABA Committee discloses to the Attorney General only the rating upon which it has decided; neither the content of the Circuit member's report to the full ABA Committee nor any of the interviews conducted by the ABA Circuit member is disclosed. *Id.*

The ABA Committee's rating, along with other information, such as Federal Bureau of Investigation reports, and the candidate's financial declaration and medical background, are then considered by the Attorney General in making a recommendation to the President. App. 7a. If the President nominates the prospective nominee, the Senate Judiciary Committee conducts a public hearing on the nomination at the beginning of the confirmation process. The ABA Committee submits its rating in

writing to the Judiciary Committee. Again, only the rating is made public; all other information concerning the ABA Committee's deliberations remains confidential.

B. The Federal Advisory Committee Act

Although appellants generally attempt to show that the FACA imposes on the government and federal "advisory committees" only relatively modest "procedural" requirements,[4] such a conclusion is incorrect. Section 3(2) of the FACA defines "advisory committee" as:

> [A]ny committee, board, commission, council, conference, panel, task force, or other similar group * * *, which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

5 U.S.C. App. II § 3(2). Numerous requirements apply to groups meeting this definition. For example, "an officer or employee of the Federal Government" must be designated "to chair or attend each meeting of each advisory committee" and advisory committees are flatly prohibited from conducting "any meeting in the absence of that officer or employee." *Id.* § 10(e). The federal officer or employee is authorized "whenever he determines it to be in the public interest, to adjourn any . . . meeting" of an advisory committee. *Id.* Advisory committees are also prohibited from holding any meeting "except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government." *Id.* § 10(f). The FACA also requires advisory committees to provide the public with advance notice of meetings and to hold open meetings. *Id.* § 10(a); *see National Anti-Hunger Coalition* v. *Executive Committee*, 711 F.2d 1071, 1073 (D.C. Cir. 1983). The FACA fur-

[4] *See, e.g.*, WLF J.S. at 3-4; Public Citizen J.S. at 3-5.

ther mandates that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents" provided to or prepared by an advisory committee "shall be available for public inspection and copying at a single location . . . ." 5 U.S.C. App. II § 10(b).

C. Proceedings Below

WLF initiated this litigation by filing a complaint against the United States Department of Justice on October 21, 1986, that was largely identical to a suit filed a year earlier by WLF against the ABA and the ABA Committee.[5] In its complaint in this case, WLF asserted that it "wishes to participate further in the federal judicial selection process, including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public." WLF Complaint ¶ 3. To that end, WLF requested the names of potential judicial candidates reviewed by the ABA Committee, the reports and minutes of all meetings of the Committee held during the last two years, and the date and place of all future meetings. *Id.* ¶¶ 15-16. The ABA declined to comply with WLF's requests. *Id.* ¶ 18. WLF further alleged that "[a]t least since the election of President Reagan in 1981, the ABA has investigated . . . judicial candidates' political and ideological philosophy . . . in such a way as to penalize or discredit candidates

[5] On November 26, 1986, the district court dismissed WLF's original suit against the ABA defendants. While noting that defendants had "raised serious questions about the constitutionality of plaintiff's proposed application of the FACA," the court did not reach those questions. *WLF I*, *supra*, 648 F. Supp. at 1356. Instead, the court held that the FACA does not create a private right of action solely against a "private, preexisting group" which provides advice to the government. *Id.* at 1361. That ruling is not at issue in this case. WLF has appealed *WLF I* to the Court of Appeals for the District of Columbia Circuit, which has held that proceeding (No. 87-7022), pending the outcome of this case.

who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President." *Id.* ¶ 10. In view of these allegations, WLF requested, *inter alia*, that the court enter an order requiring the ABA Committee to provide advance notice of its meetings and to hold those meetings in public (*id.* ¶ 25-27) and requiring that the Committee's "records, transcripts, working papers, and other documents" be made available for public inspection (*id.* ¶¶ 33-36).

In a decision issued August 4, 1988, the district court granted the Justice Department's motion to dismiss.[6] App. 1a-27a. The district court first concluded that the ABA Committee falls within the FACA's definition of "advisory committee." *Id.* at 7a-14a. However, the court then held that application of the FACA to the activities of the ABA Committee would violate the constitutional principle of separation of powers. *Id.* at 15a-27a.

The district court began its constitutional analysis by holding that, in light of the different roles explicitly assigned by the Constitution to the President (nomination) and Congress (advice and consent) with respect to the appointment of federal judges, the Legislative Branch should not be permitted to interfere with the Executive's selection process. *Id.* at 15a-19a. Next, applying this Court's decision in *Nixon* v. *GSA*, 433 U.S. 425 (1977), the district court considered whether the "potential for disruption" of the Executive's power to nominate caused by the application of the FACA in this case is "justified by an overriding need to promote objectives within the constitutional authority of Congress." App. 19a-20a (*quoting Nixon* v. *GSA*, 433 U.S. at 443). The district court found that there is "obvious and significant potential for disruption" stemming from the severe intrusion on the President's ability to obtain "confidential, candid

[6] Subsequent to the filing of the Justice Department's motion, appellant Public Citizen moved for and was granted leave to intervene in this case.

and timely advice concerning the qualifications of potential nominees for the federal courts." App. 20a. The court then found that there was no "overriding" interest in application of the FACA to the ABA Committee because the Act's purpose—public accountability—would be satisfied through Senate confirmation proceedings at which Judiciary Committee members may question a representative from the ABA Committee and request additional information. App. 25a.

Based on these findings, the district court held that the FACA cannot constitutionally be applied to the ABA Committee's activities.[7] These appeals followed.

THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED, BUT THE ISSUES RAISED ARE OF SUFFICIENT IMPORTANCE TO WARRANT PLENARY REVIEW BY THIS COURT.

The district court properly dismissed the complaints in this case and its order, therefore, should be affirmed. The district court correctly found that application of the FACA to the process by which the ABA evaluates potential judicial nominees and communicates its evaluations to the Executive Branch would severely intrude on the President's ability to obtain "confidential, candid and timely advice concerning the qualifications of potential nominees for the federal courts." App. 20a. Such an intrusion would violate the constitutional doctrine of separation of powers. Furthermore, application of the FACA to the ABA's internal communications and expression on governmental affairs would result in the most elementary kind of unlawful governmental infringement on freedom of association and freedom of speech.

However, this Court need not reach any of these constitutional questions because examination of the FACA

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[7] After judgment, the ABA intervened in the district court as a party defendant for the purpose of participating in this appeal.

and its legislative history demonstrates that it was not intended to cover those groups not formally established as "advisory committees" under that Act, and that provide information to the President or his delegatees in matters exclusively committed to the President under the Constitution, such as the nomination of candidates for appointment to the federal judiciary.

A. Application Of The FACA To Communications With The Executive Branch Relating To Judicial Appointments Would Violate The Separation Of Powers Doctrine.

The power to nominate federal judges belongs solely to the President. Appellants' assertion that the President shares this nomination power with Congress is refuted by the plain language of the Constitution (Article II, Section 2) and by the decisions of this Court. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976). Federal district and circuit court judges are constitutionally required to be nominated by the President and appointed by him with the advice and consent of the Senate. The district court correctly held that this nomination and appointment power is not a "shared" power in which Congress has a constitutionally authorized interest that might permit application of statutes like the FACA to the Executive's appointment process. App. 16a-19a. Thus, while the Constitution does recognize a Legislative Branch interest in the appointment of federal judges, that interest is strictly limited by the Constitution to the Senate's rejection or acceptance of the President's nominations. Accordingly, legislation like the FACA impermissibly invades the complete authority of the President over the consideration and nomination of federal judges.

Even if this Court were to conclude that Congress may participate in the nomination and appointment process beyond the Senate's advice and consent role, the application of the FACA and its burdensome and intrusive requirements to that process would clearly present a "poten-

tial for disruption" of the President's constitutionally assigned function which could not be justified by an "overriding need" to promote legitimate congressional objectives. *See Nixon* v. *GSA*, 433 U.S. at 443. Application of the FACA to the ABA Committee would dictate the manner in which the President can obtain advice, impose congressional restrictions on the President's choice of advisors to fulfill that exclusively committed constitutional duty, and mandate broad public access to the process by which the President carries out that function. In particular, confidentiality, prior to the submission of a nomination to the Senate, is essential for candid presentation of views. This Court recognized in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), that confidentiality is

> a necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

These concerns and principles are fully implicated in the President's solicitation of information regarding the qualification of individuals for nomination to the federal bench. As the district court properly recognized, the President needs and is entitled to the fullest candor of individuals and organizations regarding his nominations to these important life-tenured positions if he is to fulfill his constitutional duties properly. App. 21a-25a. If there are questions concerning a particular nominee, the President must have that information prior to formal submission of a nominee to the Senate for confirmation. However, in light of the concern for individual privacy, as well as the general prestige, political influence, and potential power of judicial nominees within the legal community, individuals or organizations may well temper their views and the thoroughness of their investigations

if the FACA, and its attendant disclosure requirements, were applicable.

This potential disruption of the President's accomplishment of his constitutional duty is clearly not justified by an "overriding need" to promote constitutionally authorized Congressional objectives. *Nixon* v. *GSA*, 433 U.S. at 443. The interests Congress explicitly intended to be served by the FACA cannot justify the severe intrusion on the President's appointment power because those interests either are not implicated in the President's use of the ABA Committee or are already adequately served by the Senate's advice and consent role under the Constitution.[8]

Finally, as the district court properly found, there is no merit to appellants' argument that it is premature to consider whether application of the FACA's disclosure provisions would interefere with the President's appointment power.[9] *See, e.g.*, Public Citizen J.S. at 15-18. The entire thrust of WLF's complaints against the ABA and the Department of Justice is its desire to participate in meetings held by the ABA Committee and to review the Committee's records and reports. *See* discussion at 7-8, *supra*. Accordingly, Public Citizen, which intervened in

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[8] *See* discussion *infra*, at 18-19 & n.16.

[9] The district court flatly rejected this argument, stating (App. 23a):

> Plaintiffs cannot have it both ways. Plaintiff WLF specifically requests as relief that this Court declare that "all" of FACA's requirements apply to the ABA Committee. Public Citizen's complaint requests broadly that DOJ be ordered "to comply with FACA's requirements." Although it may be strategically wise to suggest that this Court need not concern itself with the implications of actually applying FACA to the ABA Committee, it is disingenuous to argue that this Court is somehow "not confronted with a concrete case involving the specific application of any of FACA's provisions." It must be presumed that plaintiffs mean what they say in requesting that FACA's few basic requirements be applied to the ABA Committee.

this case only after the Government filed its motion to dismiss WLF's complaint, should not now be heard to argue that WLF's complaint does not really mean what it says and that the disclusure provisions of the FACA are not necessarily implicated in this case.

B. Application Of The FACA To The Activities Of The ABA Committee Would Violate The First Amendment.

1. The First Amendment plainly protects the right of association of ABA members. Courts and commentators have long recognized that "effective advocacy of both private and public points of view is undeniably enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).[10] Indeed, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court noted that First Amendment freedoms "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622. Therefore, implicit in the right to engage in protected First Amendment activities is "a corresponding right to associate with others in pursuit of a wide variety of political, socal, economic, educational, religious and cultural ends." *Id. Accord, Board of Directors of Rotary Club Int'l* v. *Rotary Club of Duarte*, 107 S. Ct. 1940, 1947 (1987). A statute unconstitutionally infringes on this "freedom to engage in group efforts" when it attempts to require disclosure of a group's inner workings, *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982), or when it tries to "interfere with the internal structure or affairs" of the group, *Cousins* v. *Wigoda*, 419 U.S. 477, 487-88 (1975). *See Roberts*, 468 U.S. at 622-23.

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[10] *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

In addition to freedom of association, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The free discussion at issue here has two related, but distinct, aspects. First, the ABA Committee and its members are entitled, as private citizens and a group of private citizens, to gather information and confer among themselves and with members of their profession and communities concerning governmental affairs. Second, the Committee and its members have the further, independent right to petition the federal government concerning these governmental affairs. *See McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

2. Application of the FACA to the ABA Committee would violate these First Amendment interests. The speech at issue includes the discussion and evaluation of prospective nominees to the federal bench. This speech plainly pertains to governmental affairs. Application of the FACA to the ABA Committee would turn public glare upon the ABA Committee and its works, destroying the confidentiality of the ABA Committee's evaluation process and chilling speech on matters of public concern, which lie at the heart of the First Amendment. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 n.5 (1985); *Mills v. Alabama*, 384 U.S. 214 (1966). *See also* App. 21a. The need for confidentiality is particularly compelling in the ABA Committee's evaluation process. Confidentiality is essential in judicial evaluations to ensure free and honest expression.[11] Confidentiality encourages participation in the

[11] *See, e.g., In re Petition of Illinois Judicial Inquiry Board*, 128 Ill.App.3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before"); *Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979).

evaluation process, protects participants from retribution or harassment, and maximizes candor.[12]

Application of the FACA would also result in direct governmental intrusion into the affairs of the ABA Committee. Application of the FACA would compel the Committee to file an advisory committee charter with a federal agency (5 U.S.C. App. II § 9(c)), notify the public of Committee meetings in advance (§ 10(a)(2)), open Committee meetings and records to the public (§§ 8(b), 10(a)(1),(b)), and permit a federal official to attend all Committee meetings (§ 10(e)) and adjourn any of these meetings upon determining that adjournment would serve the "public interest" (*id.*). Such government intrusion under the FACA would destroy the right of the private Committee members to select the persons with whom they wish to associate for the purpose of developing and expressing their views. This intrusion also would enable the government to shape the content of the views of the ABA Committee by, for example, adjourning Committee meetings as soon as "undesirable" views were expressed (*id.*). Such wholesale interference with the rights of association and expression of a private group is virtually without precedent.

3. The governmental interests served by the FACA cannot justify this substantial infringement of First Amendment rights. To survive judicial scrutiny, a statute directly infringing First Amendment rights of freedom of association and expression—as appellants would apply the FACA—must (1) be intended to achieve a compelling governmental interest, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *and* (2) be narrowly drawn

[12] *See People ex rel. Ill. Judicial Inquiry Board* v. *Hartel*, 72 Ill.2d 225, 380 N.E.2d 801 (1978); *In re Petition of Illinois Judicial Inquiry Board*, 128 Ill.App.3d 798, 471 N.E.2d 601 (1984); *Baumgarten* v. *Koch*, 97 Misc.2d 449, 411 N.Y.S.2d 487 (1978); *Lambert* v. *Barsky*, 91 Misc.2d 443, 398 N.Y.S.2d 84 (1977).

to vindicate that interest, *Bellotti*, 435 U.S. at 793-95; *NAACP* v. *Button*, 371 U.S. at 435-38. *Both* of these requirements must be met for an infringing governmental action to be held constitutional. But the FACA, as broadly interpreted by the appellants, satisfies *neither* of these standards.

Here appellants cannot show any compelling government interest that would even colorably justify application of the FACA to the ABA Committee. No legitimate governmental interest would justify the abridgement of First Amendment rights resulting from application of the FACA to a private group like the ABA Committee. The government obviously has no legitimate interest in restricting or shaping the flow of information and views from private groups. Indeed, the government has not defended the proposed abridgement of the First Amendment rights of the ABA Committee and its members. Instead, in this case two private organizations seek the violation of another private organization's constitutional rights through an unprecedented application of the FACA, even though no evidence indicates that Congress ever intended the Act to be so applied.

Moreover, the FACA, as appellants would apply it, could not even colorably be characterized as "narrowly drawn" to vindicate a legitimate government interest. Any legitimate interest in open governmental communications can readily be satisfied by less restrictive means —*i.e.*, by regulating the conduct of government officials and by specifying the communications that *they* must place in the public record.

C. This Court Should Avoid Reaching The Constitutional Issues Raised By Appellants' Interpretation Of The FACA By Holding That The Act Does Not Apply To The Activities Of The ABA Committee.

As demonstrated above, the FACA cannot be constitutionally applied to the process by which the ABA evaluates potential federal judicial candidates and communi-

cates its evaluations to the Executive Branch. However, this Court need not, and indeed should not, decide this constitutional question. It is firmly established that interpretations implicating the constitutionality of statutes should be avoided if at all possible.[13] Pursuant to this basic principle, and contrary to the district court's ruling, the FACA should be construed not to apply to the communication of its evaluations to the Executive Branch.

Section 3 of the FACA expressly limits the definition of "advisory committee" to those groups "established" or "utilized" by the government "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government." The ABA Committee does not meet this definition. "Advice or recommendations" concerning prospective nominees would state whether the individual should be appointed. However, the Committee never reaches the question whether a prospective nominee should be appointed.[14] Indeed, the ABA Committee consistently has followed a policy of refusing to advise or recommend to the President or Senate Judiciary Committee any particular candidate for appointment to or confirmation for the federal bench. *See* discussion at 3, *supra*. The ABA Committee simply discloses an evaluation that it independently compiles, and would have the right to compile, even absent any request by the government.

Moreover, neither the language of the statute nor its legislative history indicates a congressional intent that the Act encompass entities like the ABA Committee

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[13] *See, e.g., United States* v. *Security Industrial Bank*, 459 U.S. 70, 78 (1982); *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981); *United States* v. *Clark*, 445 U.S. 23, 27 (1980).

[14] Even when the ABA Committee finds that a prospective nominee is "not qualified," it does not recommend that the nominee be removed from consideration.

which provide information used by the President to perform functions exclusively committed to him under the Constitution. The courts have repeatedly noted the imprecision, ambiguity and extreme breadth of the FACA's language generally, and have recognized the stifling effect that literal application of its terms would have on the conduct of government affairs.[15] In light of the imprecision of its terms and the absence of any express legislative intent that the FACA was intended to apply to the activities of the ABA Committee, the statute must be interpreted in accordance with the purposes intended to be served by Congress, giving full weight to the presumption that Congress intended an interpretation that is constitutional and avoiding constitutional questions by "adopting a saving statutory construction not at odds with fundamental legislative purposes." *United States* v. *Clark*, 445 U.S. at 31.

As indicated throughout the legislative history and cases construing the FACA, Congress enacted the FACA to: (1) control expenditures of federal resources on needless advisory committees; and (2) counteract the tendency of private special interest groups to exercise undue influence over federal agencies with regulatory or policy authority over matters directly involving those interests. These objectives are reflected in the stated purposes of the FACA. *See* 5 U.S.C. App. II, § 2(b).[16]

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[15] *See, e.g., Natural Resources Defense Council* v. *Herrington*, 637 F. Supp. 116, 119-20 (D.D.C. 1986); *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), *aff'd in part*, 580 F.2d 689 (D.C. Cir. 1978); *Nader* v. *Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975), *vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977).

[16] *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 1, 3, 4-5, 16 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6, 8, 10 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491; 118 Cong. Rec. 30271-72, 30276, 30280 (1972); 118 Cong. Rec. 16296-300,

These objectives do not apply to the ABA Committee. The Committee was not established and is not funded in any manner by the federal government. *See WLF I*, 648 F. Supp. at 1354. Moreover, the Committee is not a narrow special interest group out to promote its particular viewpoint to a federal agency with regulatory responsibility over that group. Instead, it is a broadly based professional organization, which provides information with regard to the qualifications of particular individuals under consideration for nomination by the President to the federal bench. *See WLF I*, 648 F. Supp. at 1355. Congress certainly did not have such a group or function in mind when it enacted the FACA.

Congress' legislative activity specifically related to the appointment of federal judges indicates that Congress was aware of the constitutional limitations on its power to interfere with the President's exclusive Art. II nomination and appointment powers and did not intend for the FACA to apply to the process by which the President selects nominees. In the Omnibus Judgeship Act of

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16302-03 (1972); 118 Cong. Rec. 31421 (1972) (Rep. Holifield); *Natural Resources Defense Council* v. *Herrington*, 637 F. Supp. at 120.

Consistent with the basic canons of statutory construction discussed above, and with the purposes of the FACA, courts have eschewed a strictly literal interpretation of the FACA. *See National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524 (D.D.C. 1983) (court refused broadly to construe balanced membership requirement and held that FACA requirements did not apply to "task forces" of the defendant committee); *Lombardo* v. *Handler*, 397 F. Supp. 792, 798 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977) (court interpreted the FACA as not applying to groups or organizations providing advice under contract); *Nader* v. *Baroody*, 396 F. Supp. at 1231 (court held that the FACA did not apply to meetings between high-level Executive Branch officials and private sector groups despite the fact that the language of the statute could be read to include the groups involved or other meetings of "two or more non-government persons who advise the President").

1978, Congress conditioned an increase in the number of federal district judges on the promulgation and publication by the President of standards and guidelines for the selection, on the basis of merit, of nominees for district court judgeships. While the Act appears to regulate the President's power of appointment, sections (b) and (c) expressly recognize that the President can waive such standards and that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply" with these sections or any subsequent standards and guidelines. 28 U.S.C. § 133.[17]

The legislative history of the FACA is devoid of any suggestion that Congress had the judicial appointment process in mind when it adopted the FACA. By contrast, when Congress specifically considered the extent to which it could regulate that process, Congress took great care to avoid requiring the President to comply with *any* procedures. In the absence of clear legislative direction that the FACA was intended to control the President's exercise of the judicial appointment power, the FACA should be construed narrowly to avoid an

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[17] The legislative history of the Omnibus Judgeship Act confirms that Congress recognized the constitutional limitations on legislative attempts to control the process by which the President selects judicial nominees. As the Chairman of the House Judiciary Committee explained: "We feel this language [regarding the merit selection guidelines] is not only acceptable, but is in keeping with what are, frankly, constitutional realities. We have no power to circumscribe the President's nominating authority . . . ." 124 Cong. Rec. 33510 (1978) (statement of Rep. Rodino). Thus, the House Judiciary Committee report on the bill made clear that the merit selection procedure "is not an attempt to circumvent, limit or interfere" with the exercise of the President's appointment power. H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978). Some members recognized that even the advisory nature of the merit selection procedure might pose separation of powers problems. *See, e.g.*, 124 Cong. Rec. 34544-45 (1978) (remarks of Sen. Bayh).

unconstitutional result. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Irving* v. *Clark*, 758 F.2d 1260, 1263 (8th Cir. 1985), *aff'd*, 107 S. Ct. 2076 (1987); *Bickel* v. *Burkhart*, 632 F.2d 1251, 1255 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, the district court's order dismissing the complaints in this case should be affirmed. However, in view of this Court's practice of noting probable jurisdiction in, and deciding on the merits, cases in which a single district judge has declared an Act of Congress unconstitutional, the ABA does not oppose plenary review of the district court's order.

Respectfully submitted,

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